

U.S. Department
of Transportation

United States
Coast Guard



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16210

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From: Commander, Seventeenth Coast Guard District
To: Navigability File

Subj: NAVIGABILITY DETERMINATION FOR THE CHILKAT RIVER

Ref: (a) COMDTINST 16210.1C, Jurisdictional Decisions
(b) 33 CFR 2.10-10

1. In accordance with references (a) and (b) this letter documents the basis for expanding the existing limits of navigable waters of the Chilkat River for Coast Guard jurisdictional purposes. These waters listed, taken together, form a waterway system on which substantial interstate commerce is being engaged or has the potential to be engaged.

PRIOR COAST GUARD JURISDICTIONAL DETERMINATIONS

2. There are two prior jurisdictional determinations for the Chilkat River.
 - a. **D17(dl)**. On 4 September 1969, the Seventeenth District Legal Officer, in response to an application for a bridge permit for constructing a highway bridge across the Chilkat River proposed by the State of Alaska, made the following determination:

Given the facts that the proposed site is over waters affected by the tides, the head-waters of the Chilkat River are in Canada, the river empties into navigable waters, and that the river is navigable by small rowboats, canoes, outboards and airboats; it is my opinion that there are facts to support a finding that the waters in question are "navigable waters of the United States."

Unfortunately, this prior determination cannot be relied upon because it does not document the basis for the opinion and because it is not consistent with reference (a). Only the District Commander may make navigability determinations for their district. The legal officer or others can make a recommendation for a proposed navigability determination. If the District Commander determines that there is a substantial public interest or a novel application of law is involved or that an unusually complex factual situation exists to which conflicting legal precedents or statutes apply the District Commander shall make a proposed finding respecting the jurisdictional status of the waters concerned and forward it, together with relevant material available, to Commandant (G-L) for final action by the Chief Counsel.

- when?*
- b. **Pre-DOT Act ACOE.** A second prior navigability determination for the Chilkat River was made by the Army Corps of Engineers (ACOE) prior to its transfer of the Bridge Administration program to the Department of Transportation (and subsequently to the Coast Guard) under the Department of Transportation (DOT) Act, Public Law 89-670, 80 Stat.931. It was a limited determination, however. The Chilkat River was determined navigable from its mouth to the Village of Klukwan, a distance of 25 miles. This navigability determination, as well as others listed at that time, was transferred to the Coast Guard to be used in carrying out transferred duties and regulatory responsibilities.

WATERWAY USE

3. The following information is derived from the Bureau of Land Management (BLM) Cadastral Surveys, BLM and State Navigability Reports, reports from the Arctic Environmental Information and Data Center and the Alaska Resource Library, and the 1997 Alaska Department of Fish and Game registration of commercial sport fish guides. It also has been supplemented with information acquired from field investigations and interviews with waterway users.
- a. This waterway is easily accessible via the Haines Highway; a main transportation artery located between Anchorage and Haines, Alaska. In addition, it is connected to the Alaska Marine Highway system.
- b. This waterway is passable by small jet boats typically used in the growing tourist industry. This area has experienced an increase in use annually since 1991 and is an integral part of an emerging and economically important tourist industry (number two behind oil). In 1997, well over 350 fishing and sightseeing guides were registered with the State of Alaska to operate on Alaskan inland waters.
- c. After an extensive navigability study, the BLM declared the entire waterway navigable on July 17, 1980. While not controlling on the independent Coast Guard navigability determinations, the BLM's decision is corroborative of the navigable nature of this waterway.
- d. Since pre-DOT Act ACOE and BLM determinations, use of this water above the City of Klukwan by commercial fishing, hunting, and sightseeing guides, as well as larger documented vessels, has expanded significantly. The upper section of the Chilkat Rivers main attraction is the access it provides into the upper reaches of the Chilkat Bald Eagle Preserve. Created in 1982, the Chilkat Bald Eagle Preserve has the largest concentration of Bald Eagles in the world. 32-foot jetboats and airboats carrying up to 30 passengers each, typically transiting from a loading/unloading facility located above the Haines Highway Bridge regularly navigate it. The vessels then head up the upper reaches of the Chilkat River to access the more remote natural habitat of Bald Eagles, brown Bears, Black Bears, Moose, Trumpeter Swans, and other wildlife.
- e. The close proximity of the entire waterway to both the Haines Highway and docking facilities supporting international cruise ship lines, the Alaskan Ferry system, and the recent Native Corporations Fast Ferries excursions from Juneau, the state capital, make this waterway a focus of tourism-related commerce, and gives it the potential for continued substantial growth of commercial activity. Because of its accessibility and proximity to Juneau,

Skagway, and Haines, the Chilkat River is developing into one of Southeast Alaska's most popular inland water sightseeing excursions. This waterway is the highest used in the area with current substantial use by hunting and sightseeing guides as well as documented vessel use.

ELEMENTS OF NAVIGABILITY

4. The basic standards to be applied in determining the navigability of these waterways are set forth in 33 CFR 2.05-25. Navigable waters generally include:

- (a) Territorial seas of the United States;
- (b) Internal waters of the United States that are subject to tidal influence;
- (c) Internal waters of the United States not subject to tidal influence that are or have been used, or are or have been susceptible for use, by themselves or in connection with other waters, as highways for substantial interstate or foreign commerce, notwithstanding natural or man-made obstructions that require portage.

5. This waterway is not part of the territorial sea of the United States. A portion of the Chilkat is, but the majority of this waterway is not subject to the ebb and flow of the tides. Therefore, an analysis of navigability must focus on the highway of commerce test of 33 CFR 2.05-25(a)(3)(i), which states that the waters:

Are or have been used, or are or have been susceptible for use, by themselves or in connection with other waters, as highways for **substantial** interstate or foreign commerce, notwithstanding natural or man-made obstructions that require portage, ...

6. In determining the navigability issue, courts have applied the following test:

Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition as a highway for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the act of Congress, in contradistinction from the navigable waters of the States, when they form, in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes of trade or travel on water.

The Daniel Ball, 77 U.S. (19 Wall.) 557, 563 (1870); The Montello, 78 U.S. (11 Wall.) 411; United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940); State of Alaska v. United States, 854 F.2d 851 (9th Cir. 1985).

7. A river's use "need not be without difficulty, extensive, or long and continuous" for the river to be a highway for commerce. Oregon v. Riverfront Protection Ass'n, 672 F.2d 792, 795 (9th Cir. 1982)(portion of the Mackenzie River found navigable when used to transport "thousands of logs," even though shallow areas and sand bars made the transport difficult). The mode by

which commerce is conducted and the type of vessel used in that commerce is immaterial. United States v. The Steamer Montello, 87 U.S. (20 Wall.) 430 (1874); Appalachian, *supra*.

8. The test for determining navigability has required the courts to define commerce. The Ninth Circuit Court of Appeals, which includes Alaska, has included commercial river rafting and guiding services in that definition, most notably in a navigability decision relating to the Gulkana River in southcentral Alaska. On average, the lower 30 miles of the Gulkana River is 125-150 feet wide and only 3 feet deep. Since the 1970's it has been possible to take guided fishing and sight-seeing trips on the River. The industry uses 20 to 24 foot long aluminum powerboats and 12 to 15.5 foot inflatable rafts. The court stated:

A **substantial** industry of such transportation for profit emerged in the lower Gulkana, which industry today employs approximately 400 people. To deny that this use of the River is commercial because it relates to the recreation industry is to employ too narrow a view of commercial activity.

State of Alaska v. AHTNA, 891 F.2d 1401, 1405 (9th Cir. 1990), *cert. denied*, 495 U.S. 919 (1990).

9. Since the Chilkat River now supports river commercial fishing and sightseeing guiding services, it is therefore used as a highway of commerce as defined in AHTNA, *Id.*

a. Like the Gulkana River court, the 33 C.F.R. 2.05-25 jurisdictional test used by the Coast Guard requires the waterway to be susceptible for, or actually used as a highway of interstate or foreign commerce, and that that commerce must be **substantial**. Previously, the Coast Guard interpreted substantial commerce to be more traditional uses of the waterways, such as moving cargo by barge or motor vessel. But, in AHTNA, *Id.*, the court considered a guided fishing and sight-seeing industry employing 400 people as substantial commerce. There is significant recreational boating activity (canoes, kayaks, and small inflatable rafts) in addition to commercially guided rafting, sight-seeing, and fishing businesses on the Chilkat River. Recent Coast Guard jurisdictional determinations have been consistent with the factual basis for the Gulkana River holding and have recognized such tourist operations as substantial commerce.

b. The Chilkat River is also capable of supporting commerce in a much more traditional sense. Improving technology and increasing financial incentives due to the booming tourism market have resulted in the appearance of large jetboats taking thousands of visitors per year on excursions on the river. Though not all of the Chilkat can now carry the largest vessels, the ten percent annual growth in tourism now being experienced in Alaska and the accessibility of the Chilkat to the Southeast Alaska tourist industry make it at least "susceptible" for use in substantial commerce.

10. The final element to consider is whether this substantial commerce qualifies as "interstate or foreign" commerce. The Supreme Court has held that the business of catering to interstate travelers qualifies as engaging in interstate commerce. Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964). Other courts have held that interstate commerce includes the use of intrastate waters by interstate travelers for water related recreational purposes. United States v. Byrd, 609 F.2d 1204 (7th Cir. 1979); United States v. Underwood, 344 F.Supp. 486 (D.C. Fl.

1972). See also: Loving v. Alexander, 548 F.Supp. 1079 (D.C. Va. 1982) *aff'd* 745 F.2d 861 (4th Cir. 1984)(recreational use of a waterway by out of state travelers would affect interstate commerce); Kaiser Aetna, *supra*. (use of marina by non residents with recreational vessels was legal equivalent of toll-charging channel or harbor, and was interstate commerce). In Minnehaha Creek Watershed Dist. v. Hoffman, 449 F.Supp. 876, 883 (D.C. Minn. 1978) *aff'd in part, rev'd in part on other grounds* 597 F.2d 617 (8th Cir. 1979) the District Court said:

A link to interstate commerce may be found where a commercial tourist operation depends on a waterbody as its attraction to interstate travelers, and injury to the waterbody might adversely affect that commerce.

11. The central theme in determining navigability for purposes of federal regulatory jurisdiction is the movement of people or goods for commercial purposes from point to point on a waterway with an interstate linkage. Tourism is the second largest commercial interest and revenue source in Alaska and has been growing over the past several years at a rate of ten percent per year. Many tourists travel to Alaska each year to enjoy the natural beauty of its scenery and waterways. The watercraft which carry these tourists are vehicles by which interstate commerce is conducted. When those waterways further connect with the open sea or other recognized avenues of waterborne interstate commerce, they are the highways upon which it takes place. This waterway forms a "highway of commerce" because there is a navigable connection from this waterway to open water of Chilkat Inlet of Lynn Canal, and all of these waterways are tied to the existing substantial tourism infrastructure centered in Southeast Alaska and the Haines Highway. The business of carrying out of state and foreign tourists for hire on these scenic waters of Alaska, then, can be considered to be interstate or foreign commerce.

COAST GUARD JURISDICTION

12. This waterway is not part of the territorial sea. However, it is used, or susceptible for use in its natural and ordinary condition as a highway for substantial interstate or foreign commerce, notwithstanding natural obstructions that may require portage. Therefore, I expand the existing limits of navigable waters of the Chilkat River for Coast Guard jurisdictional purposes. This waterway, in its entirety, is now considered to be navigable waters of the United States and the Coast Guard shall assert jurisdiction with regard to it.

13. This determination solely represents the opinion of the Coast Guard as to the extent of its own jurisdiction, and does not represent an opinion of the extent of the jurisdiction of the United States or any of its other agencies. This determination is subject to modification should additional information be discovered or other conditions change.



T. J. BARRETT

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